No. 6792

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Plaintiff,

vs.

Alexander Stumpf, J. L. Coates, Olie Olson, Theodore Brix, Zone Kirkorian, D. Arkalian, James Proctor and Eugene L. Kenney,
Defendants.

J. L. Coates,
Appellant,

vs.

United States of America,
Appellee.

GOVERNMENT'S BRIEF IN ANSWER TO OPENING BRIEF OF APPELLANT COATES.

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United States of America,
Appellee.

GOVERNMENT'S BRIEF IN ANSWER TO OPENING BRIEF OF APPELLANT COATES.

There are four counts in the indictment, the first of which charges this appellant and seven others with conspiracy to violate sections 3 and 25, title II, of the National Prohibition Act, viz: to manufacture and possess apparatus intended and designed for the unlawful manufacture of intoxicating liquor for beverage purposes, to contain more than one-half of one per cent of alcohol

by volume, without having or intending to have a permit from any proper federal authorities. The period covered by the conspiracy is alleged to be between September 1, 1930, and April 21, 1931.

The second count charges the defendants with having in their possession and custody and under their control near Fresno, California, one still and distilling apparatus set us on the Foss ranch without having or intending to have a permit from the proper federal authorities.

The third count charges the defendants with carrying on the business of distillers on said Foss ranch without having given bond, with intent to defraud the United States of a tax on spirits distilled by them.

The fourth count charges the defendants with having, on or about February 1, 1931, at the same place, possession of property and apparatus designed and intended for the manufacture of intoxicating liquor for beverage purposes containing alcohol in excess of one-half of one per cent by volume, in violation of section 25, title II, of the National Prohibition Act.

Appellant Coates was convicted on the first and fourth counts and was sentenced to serve one year and one day at McNeil Island and to pay a fine of $1,000 on the first count, and to pay a fine of $100 on the fourth count. From this judgment he appeals.

With his petition for appeal appellant filed, under Rule 11 of this court, thirty assignments of error. His brief, however, contains but twelve. In his argument appellant does not deal separately with each of the twelve assignments and, in view of the method of presentation of appellant's argument, we will endeavor to follow as nearly as possible the course outlined by him.

FACTS.

Under the above heading appellant has undertaken to review and criticize part of the evidence, and we deem it advisable, in order to fully present this appeal, to review and enlarge upon the facts as therein outlined.

It is contended that appellant's conviction was brought about principally through the testimony of Stumpf, who had previously pleaded guilty to the first and fourth counts. Stumpf had been convicted of a felony once before, not twice, as stated by appellant, as his plea in this case was his second conviction [Tr. p. 55].

Stumpf was not the only witness for the Government who gave testimony against Coates, and we think a careful perusal of the transcript will show that, while the testimony of Government's witness G. H. Malter did not agree in many details with that of Stumpf, his testimony, together with the testimony of "Cap" A. J. Olson, Proctor and Kenney, would have sufficed to convict Coates without any testimony from Stumpf.

In this connection we respectfully direct the attention of the court to the testimony of A. J. Olson, "Cap" Olson, a brother of defendant Olie Olson. He testified that he was introduced to Coates by Malter on his place, that he did not see Coates after that until he went up with him to the still, that on the road going up to the still Coates told Olson that he was going to show the still to him and see if he got "gypped" on it. When they got to the still they met Stumpf, who took Coates and Olson in the barn and showed them the "whole apparatus, tanks, still, the boiler and mash" [Tr. 107-108]. He further testified that the still was on the Foss ranch,

that he saw about 2,000 gallons of mash, which he tested, that Stumpf told him that it hadn't been working good, because it was too cold, that Coates was there when this statement was made and asked Olson, "Can you make anything out of that?" Furthermore, he testified that Coates asked him if he thought that still came from Los Angeles, and Coates further stated to Olson that Stumpf had told him he got the still in Los Angeles and had paid $2,000 for it [Tr. 108].

Ferdinand Andreas testified that he had worked for Coates at a filling station and that in September Coates put him "on a different job" from that which he had previously occupied, raising his salary from $90 a month to $5 a day. His work under the increased salary was to drive a truck, that a Chevrolet truck was purchased in the name of Andreas and the next day Coates, Malter and Stumpf came out and gave him a receipt for $100, representing the first payment on the truck; that Coates told Andreas to take orders from Malter and Stumpf. Andreas used the truck for hauling pipe, brick, posts, timber, lumber and barrel staves to Cane's ranch. He further testified that later on he was sent out to Caruther's place and that there were a couple of men there by the names of Cannon and Kerr when he arrived; that he hauled some nails, hammers, and black paper out to Caruther's ranch and worked with the other men cleaning out the barn; that during that period some men came and looked in the barn; that after that Andreas reported this fact to Coates, and right after that Coates told him, Andreas, to go home; that that night, about 12 o'clock, Coates and Malter came to where Andreas was sleeping and woke him and told him to move the stuff back in

the Malter garage. After that Andreas told Coates that he did not like the job and Coates transferred him to Salinas, where he had a service station, and reduced his wages to $100 per month. Before Andreas left he signed over the truck to Coates; that Coates would not give him his pay check until he had signed an affidavit "in full power of the lawyer to go and get the pink slip for the truck" [Tr. 116-118].

W. G. Walsh, a Government witness, engaged in the truck business at Fresno, testified that he sold this truck to Andreas and that Coates and Andreas contracted for the truck and the contract was made in the name of Andreas [Tr. 120].

Defendant E. L. Kenney, who pleaded guilty to all counts, testified that he saw Coates on the Foss ranch twice and heard a conversation between Coates and Stumpf with reference to paying the salaries of himself and defendant Proctor some time between February 9 and 12. He stated that Coates said, "I refuse to pay anything off. I put money in this deal and have never got any money back out of it." That Coates said to Stumpf, "I gave you $3,000, Mr. Malter gave you $3,000 and I refuse to put any more money in the deal. In regard to paying these men off, the only way I know that they will get their money is to go ahead and run the stuff off and sell the stuff" [Tr. 125].

Kenney also testified that Stumpf introduced Coates to him under the name of Brown at the Foss ranch and that he saw Coates there with Cap. Olson about February 10th or 11th; that Olson and Coates went in the barn. At that time Stumpf said, "I am going to get out from

this deal, and this is your new boss," referring to Coates. Kenney had become insistent upon collecting the money due him for labor and Stumpf offered him $30.30, which was declined. The still had been built, but had not proved satisfactory, but it was still up and when Coates and Olson came up the still had been tested and the run made on it. About one gallon of alcohol had been distilled, and Kenney testified that the trouble was that the mash was not in shape to run and the still leaked. The still was torn down and a new condenser made. "We all helped to make it. Olson was the mechanic" [Tr. 127]. That Coates, the last time he was at the still, ate at the house; that Olson worked on the still about five or six weeks, and during the progress of this work Kenney saw appellant Arkalian there; that he came with the defendant Kirkorian. Kenney also testified that of the alcohol manufactured Stumpf took a sample and left the remainder [Tr. 127]. In this connection Stumpf testified that he took the alcohol to Coates at the service station in Fresno and that Coates took several drinks of it and asked Stumpf if he couldn't get a gallon [Tr. 166].

Defendant Proctor, who had been dismissed out of the case on the motion of the Government, testified that he saw Coates, Arkalian and Kirkorian at the Foss ranch; that Coates came along the first time and that Stumpf introduced Coates to Proctor under the name of Mr. Brown; that Coates ate lunch there once when Cap Olson was with him and that they went into the barn, where the still was [Tr. 131-132].

Malter testified that he went with Stumpf and Coates to the Caruther's ranch, ten miles west of Fresno, in October; that Coates recommended Andreas to run the

truck; that Stumpf, Coates and Malter, while out riding at one time, went by the Caruther's ranch and on another occasion went in [Tr. 162]. Coates was with him that time. They saw tanks, equipment, etc., and saw Kerr and Cannon working there setting up tanks and cleaning out the barn; that at Malter's house Coates wrote down items of expenditure on a yellow card, which was introduced as Government's Exhibit No. 5 [Tr. 162]. This was in October. He talked with Stumpf and Coates about the San Diego trip, and Stumpf said he wanted to get a location for a still out near Clovis and had Coates drive him out there, but that the owner lived in San Diego, and it would be necessary for Stumpf to go down there and see him [Tr. 163]. Malter further testified that Coates had reported to him that Andreas had told Coates about some men looking in the barn at Caruther's ranch and "then Coates and I decided it would be a better idea to get out of the place, it might be dangerous" [Tr. 164] and that he and Coates went and told Andreas to move part of the tanks and paraphernalia to Cain's place and the balance to Malter's place [Tr. 164]; that the equipment, etc., was next taken to the El Senora place, concerning which Stumpf had told Malter that he, Stumpf, had rented, and that from there it was taken to the Foss ranch, which Stumpf had told Malter he had obtained from Mr. Foss.

Malter also identified Exhibits 1, 2 and 3, being different parts of the still, as the things that had been moved to the Foss ranch. Malter further testified that Stumpf had some alcohol which Stumpf stated in the presence of Coates and himself had been produced in the still at the Foss ranch; that Coates took two or three drinks of

this alcohol and said it was pretty good [Tr. 165], and Coates asked Stumpf if he could get five gallons of it [Tr. 166].

Howard N. Foss, a Government witness, testified that Stumpf bought the Foss ranch from him and at the time he was carrying on these negotiations Stumpf had told him that he was going to fix it up for a dude ranch [Tr. 172].

There was other testimony connecting Coates with the enterprise, but that already referred to will suffice to show that Coates was connected with the scheme from the time that Andreas was hired to drive the truck when he and Malter were fixing up the place at Caruther's ranch and from then on, covering the period when the tanks and paraphernalia were taken to the Cain and Malter ranches and from there to the Foss ranch.

There Were Not Two Distinct Conspiracies.

On page 6 of his brief appellant contends that there were two distinct conspiracies, viz: the Stumpf, Brix, Malter combination, and the Stumpf, Malter, Coates combination, the first being to defraud Brix of money and the latter to defraud Coates. The evidence does not support this claim, for Malter testified that he put in his money to the extent of $1800 in cash [Tr. 169].

It is immaterial, however, who put up the money for the enterprise or whether or not Stumpf and Malter conspired to deceive Coates or Brix by obtaining more money from them than they intended to expend. This was not the issue before the jury. Regardless of that fact, however, the evidence shows that Stumpf expended

much money for the furtherance of the enterprise and, besides that, he was entitled to deduct his salary of $10.00 a day while Brix was in the deal. It appears that Stumpf must have expended a good portion of the money he received, including the money that Malter claims to have paid him.

Stumpf testified that some of Coates' money was used in the Brix deal [Tr. 93]. True, Stumpf testified that "the deal between me and Brix and Malter was entirely a different deal from the deal between me and Coates and Malter, but we did use some of Coates' money in the deal between Brix and Malter and myself. The deal dropped with Brix at that time. It dropped about 40 or 50 days when we first started. Brix had clear run out on me before I called Coates in on this deal." But Coates was contributing for the purpose of building a still very early in the enterprise, beginning at the time operations were being carried on at the Caruther's ranch [Tr. 162-163]. The conspiracy charged is that of manufacturing and possessing apparatus intended and designed for the illicit production of intoxicating liquor without having a permit so to do. Both Coates and Brix contributed towards the construction of the same still. The time or manner in which the capital was obtained is immaterial. They were all working to the same end and engaged in the same enterprise.

The evidence shows that Malter first contacted Coates after the money put up by Brix and Malter had been spent, and that after Coates had put up the first $500 Stumpf went to San Diego to get a location. The mere fact that different persons may have entered the enterprise at its different stages of development does not change

in any way the nature of the scheme or conspiracy. Any person knowingly entering into an unlawful scheme or conspiracy is bound by everything that was done before his entrance therein and thereafter as long as he continues to participate in the enterprise.

Appellant's argument leads to the absurd conclusion that every time a new participant enters into a conspiracy such entrance terminates the conspiracy then under way and creates a new one. Such doctrine has no support in law and we do not believe that any decision of any court can be found to support it.

Testimony of Whitfield.

On page 12 of his brief appellant deals with the testimony of Mr. Whitfield, a federal prohibition officer, who testified for the Government. A statement or confession signed by the defendant Olson was introduced through Whitfield. This was objected to by Coates, but the court ruled that it was admissible only as against Olson. The Government announced at the time this statement was offered that it was offered only as to defendant Olson and the court repeatedly instructed the jury that it must be limited to Olson alone [Tr. 141-143]. Olson is not appealing, and no error was committed.

Hagen v. U. S., 268 Fed. 344 (9th Cir.).

On page 13 of his brief, however, appellant states that the court denied his motion "to strike from the evidence all parts of the Olson statement referring to Coates." The motion was not that the statement be limited to Olson, which the court had already done and had so instructed the jury, but was to strike from the evidence all parts

of the statement made by Olson and referring to Coates. If this motion had been granted as made, the court would have taken the entire statement out of the case *for all purposes and as to all defendants, including Olson himself.* Obviously this would have been error, as the jury was entitled to consider *all* of Olson's statement as against himself. The court, however, was very careful to admit it for the limited purpose above stated [Tr. 142-143].

Furthermore, the motion referred to on page 13 of appellant's brief did not relate to the Olson statement, but referred only to an objection to a question asked by Mr. McNabb as follows:

> "Did not Mr. Brix offer to plead guilty?" [Tr. 152].

After such objection was made the court said:

> "This is something happening after the indictment, of course, and after the conspiracy had terminated, and is, therefore, only admissible against the one making the statement. That is the rule. The jury no doubt understands that, because I stated it very plainly yesterday."

Then, too, Brix is the only one who could now urge this objection. He was acquitted. The court limited the question to Brix and, in addition to all this, Whitfield specifically stated that "Mr. Brix did not offer to plead guilty himself. * * * Mr. Fenston (attorney for Brix) said that he was willing to enter a plea of guilty to any misdemeanor charge, but he did not like to see the boy do a jail sentence for a conspiracy."

If any further reason why the objection was not well taken is necessary we further urge that such objection and ruling of the court is not included in the assignment of errors set out in appellant's brief, although it was included among the 30 specifications filed on the appeal [Appellant's Brief, pp. 3-5; Tr. 208, Assignment No. 18].

On page 14 of his brief appellant discusses assignment of error Nos. V and VI, which involve objection to and a motion to strike from the record the testimony of Fred D. Stribling, Government chemist, to the effect that he had tested Exhibit No. 6, which is a sample of liquid taken by Mr. Whitfield and found to contain 3.24 per cent alcohol by volume. This sample was a part of one-half a gallon bottle of mash taken from the gravity tanks that were found at the still location in the barn at the Foss ranch. It was tested by Mr. Stribling within a few days after Whitfield obtained it.

The grounds upon which the motion to strike the testimony of Stribling were that the charge in the indictment was conspiracy to possess and manufacture a still and not to manufacture liquor, and that the evidence was therefore irrelevant and immaterial [Tr. 113-114].

The objection of appellant was not well taken, for the reason that the liquor was found at the location of the still and consisted of mash, which evidently was intended to be used for the purpose of manufacturing intoxicating liquor illicitly.

The indictment charges that the conspiracy was to violate sections 3 and 25, title II, of the prohibition law. Section 3 prohibits the manufacture, selling, transportation, delivery, furnishing or possession of such liquor,

and section 25 makes it unlawful to have or possess any liquor or property designed for the purpose of manufacturing intoxicating liquor. This mash was intended for the manufacture, which, necessarily, would involve the possession, to say the least, of such intoxicating liquor. The presence of this mash at the place where it was found clearly was relevant and material and strongly tended to establish the purpose for which the still, vats, etc., were to be used.

There is no doubt but what this sample was taken some time after the enterprise had ended, but this fact goes only to the weight of the evidence and not to its relevancy or materiality.

On page 18 of his brief appellant states erroneously that, from Malter's testimony, he never paid any money into this venture, and that Stumpf returned to Malter what money he put up. Malter, however, testified to the contrary, claiming that he put in $1800 [Tr. 169].

Malter Was Not Disqualified as a Witness.

On page 20 of his brief appellant urges error in the ruling of the court in permitting the witness Malter to testify, claiming that he was disqualified and incompetent as a witness because he had perused portions of the transcript, although the court had entered an order excluding all witnesses from the courtroom. The question is raised by assignment of error No. VIII, page 4 of his brief [Tr. 138-140; 153-156].

From the statements of counsel, which must be accepted as true, as they were not challenged, it appears that Malter had access to fragments of the reporter's record

of the testimony, consisting of a very small part of the entire record, but that he had never seen the entire transcript of the testimony of any one witness in the case [Tr. 156].

The court ruled that the admission of Malter's testimony was within the discretion of the court [Tr. 153-154]. Thereupon Mr. Curran, attorney for Brix, requested that "we", evidently meaning all of the defendants, "be permitted to show at this time, through the testimony of witness Malter, exactly what the circumstances were surrounding the reading of these transcripts."

The court, in response to Mr. Curran's request, stated that he might do so by cross-examination of Malter [Tr. 154]. Later on, upon the cross-examination, Malter stated he had read excerpts out of several volumes, but no complete volume; that Mr. Davis, of counsel for the Government, directed his attention to one or two excerpts and that he possibly read 30 or 40 pages, but didn't think it was that much [Tr. 167].

Counsel for Coates also cross-examined Malter and during the course of such cross-examination interrogated him concerning his reading of the testimony [Tr. 170].

The order of sequestration of witnesses did not, in terms, prohibit the witnesses from talking to counsel representing the respective sides, or in terms prohibit counsel from calling attention of witnesses to the testimony given by other witnesses. It is fair to presume, however, that such was the intent and spirit of the order, and we will present the matter on that assumption.

The undisputed testimony shows that Malter read but a very small portion of the transcript of the testimony

given by Stumpf. The only possible harm that could result from such conduct on the part of Malter would be in the repeating of the testimony given by Stumpf. In this connection, it will be observed that these two witnesses positively contradicted each other in their testimony on several points. It is obvious, therefore, that no harm actually resulted to the prejudice of the appellant. Error without prejudice is no ground for reversal. It is impossible, after reading the testimony of both these witnesses, to see wherein Malter patterned, or in any way shaded, his testimony to conform to that of Stumpf.

The matter of sequestration of witnesses is entirely within the discretion of the trial court, and a witness who disobeys the order of the court in this respect may be punished for contempt, but such disobedience does not disqualify the offender in any way from testifying.

> "The right of excluding witnesses for disobedience to such an order, though well established, is rarely exercised in America; but the witness is punishable for contempt." (1 Greenleaf on Ev. (16th Ed.), sec. 432c.)

The Supreme Court of Georgia, in the case of *Lassiter v. Georgia*, 67 Ga. 739, held that the trial court committed error in refusing to allow a witness for appellants to testify, on the ground that such witness was present in court in violation of the order of the court excludng the witnesses during the trial, unless appellants were in complicity with the witness, although the witness might have been punished for contempt in disobeying the order. This court further held that an innocent party should not be deprived of the evidence on that ground, but refused to reverse the lower court, because the appellants

were not injured by such erroneous ruling of the trial court.

The jury were fully advised as to the extent to which Malter examined the transcript of Stumpf's testimony. They were the sole judges of his credibility and the weight of his testimony and must have taken Malter's conduct into consideration in determining the weight and credibility to be given thereto.

Error without prejudice to the rights of the accused will be disregarded.

Sec. 269, *Judicial Code;*
Title 28, sec. 391, *U. S. C. A.;*
Green v. U. S., 19 Fed. (2d) 850;
Horning v. Dist. of Col., 254 U. S. 135, 65 L. Ed. 185.

In the case of *Wilson v. State,* 52 Ala. 299, the Supreme Court of Alabama said:

> "If the rule is made, and a witness remains in court in violation of it, intentionally or by mistake, it is discretionary with the court to permit or refuse his examination, *and the exercise of the discretion is not revisable.* (Greenleaf on Ev. (16th Ed.), sec. 432; State v. Brookshire, 2 Ala. 303.)"

It appears that the courts are not in entire accord on every phase of the question presented, but from our analysis of the cases we believe the courts agree that it is entirely within the discretion of the court to permit or reject the testimony of a witness who has intentionally, or by the wilful complicity of those representing the side calling such witness, violated the order of sequestration, and that the ruling of the trial court is not subject to review; that where it appears that no harm or prejudice

resulted from such disobedience on the part of the witness, his testimony will be permitted, and that any witness intentionally violating the order of the court in this connection is subject to punishment for contempt.

Holder v. U. S., 150 U. S. 91, 37 L. Ed. 1010;
1 *Greenleaf on Ev.* (16th Ed.), sec. 432;
Hubbard v. Hubbard, 7 Ore. 42;
Bulliner v. People, 95 Ill. 394;
State v. Ward, 61 Vt. 153;
Wilson v. State, supra;
Lassiter v. Georgia, supra;
3 *Wigmore on Evidence* (2nd Ed.), sec. 1837, pp. 901-919.

We find nothing showing any reversal or modification of the decision of the Supreme Court of the United States in the case of *Holder v. U. S., supra,* in *Shepard's Citator,* or elsewhere. In that case the court lays down the rule that, if a witness disobeys the order, he may be punished for contempt and his testimony is open to comment to the jury because of his misconduct, but that he is not thereby disqualified and that the weight of authority is that he cannot be excluded on that ground merely, although under particular circumstances it is within the sound discretion of the trial court to exclude his testimony.

No Error in Admitting Exhibit No. 5.

On page 23 of his brief appellant asserts error because of the introduction over his objection of Government Exhibit 5, which is a memorandum on a yellow card upon which Malter testified Coates wrote down notes of the cost of various items of materials purchased for the

enterprise. The objection was on the ground that it was irrelevant, incompetent and immaterial and no proper foundation had been laid.

In this connection Malter testified that Coates wrote down the items on the card and that Stumpf had given him these items some time in October while the three of them were at Malter's house and that this card had been under his control or in his possession; that "it was left on the table, and I accidentally picked it up in a corner some four or five months later. That is the card that Coates was writing on at the time" [Tr. 162]. The materiality is evident and the foundation ample. The court properly admitted this exhibit.

There is no assignment of error, however, in appellant's brief covering this alleged error, although it was specified as assignment No. VII in the assignment of errors filed with the appeal [Tr. 202].

Rule 24 of this court requires that appellant's brief shall contain a specification of errors relied upon, in which shall be set out separately and particularly each error asserted and intended to be urged. This has not been done and this alleged error should not be considered by the court on this appeal unless it shall appear to the court that it is a plain error, within the purview of Rule 11.

Appellant quotes, on pages 24-30 of his brief, from the testimony of several other witnesses, showing where objections and exceptions were made to certain rulings of the court, but we find none of these covered by either his assignment of errors in his brief or those filed upon the appeal, as shown in transcript, pages 201-212. We will, therefore, omit special reference thereto.

ARGUMENT.

On page 30 of his brief appellant argues that the evidence shows the existence of two separate and distinct conspiracies and that appellant was a member of only one of these, the Stumpf-Malter-Coates conspiracy, if any existed; that Coates had nothing to do with the first conspiracy, did not know anything about it, and that he was not told that Brix had put up any money on the still.

All these persons were engaged in a common unlawful purpose, and all who, in any manner, contributed towards the furtherance of this unlawful purpose, or to the continuing of the unlawful conspiracy, which was initiated by Stumpf, Malter and Brix, even though they were not the original parties thereto, are equally culpable with the originators of the scheme.

Van Riper v. U. S., 13 Fed. (2d) 961;
Samara v. U. S., 263 Fed. 12;
Burkhardt v. U. S., 13 Fed. (2d) 841;
U. S. v. Olmstead, 5 Fed. (2d) 712;
Simpson v. U. S., 11 Fed. (2d) 591.

The conspirators need not be acquainted with each other.

Allen v. U. S., 4 Fed. (2d) 688;
Rudner v. U. S., 281 Fed. 516.

It is immaterial what time one may join the confederacy.

U. S. v. Schenck, 253 Fed. 212, affirmed, 249 U. S. 47, 63 L. Ed. 470;
Nyquist v. U. S., 2 Fed. (2nd) 504;
Thomas v. U. S., 156 Fed. 897.

Erection of a still or manufacturing or keeping of liquor for sale, pursuant to agreement, renders all participating guilty of conspiracy.

Liberato v. U. S., 13 Fed. (2d) 564 (9th Cir.).

Joinder of a defendant in a conspiracy relates back to the date of its formation.

Norton v. U. S., 295 Fed. 136;
Jezewski v. U. S., 13 Fed. (2d) 599 (6th Cir.).

Two or more persons may initiate or promote a conspiracy to violate the law, but after they have done this anybody who comes in afterwards and takes part in it thereby becomes guilty as a conspirator from the time of its beginning.

Hunter v. U. S., 267 U. S. 597, 69 L. Ed. 806;
Mullen v. U. S., 267 U. S. 598, 69 L. Ed. 806;
Shea v. U. S., 251 Fed. 433 (6th Cir.);
Johnson v. U. S., 268 U. S. 689;
Calcutt v. Gerig, 271 Fed. 220;
Allen v. U. S., 4 Fed. (2d) 688;
Lew Moy v. U. S., 237 Fed. 50 (8th Cir.);
U. S. v. Cassidy, 67 Fed. 698;
Burkhardt v. U. S., 13 Fed. (2d) 841;
Liberato v. U. S., 13 Fed. (2d) 564 (9th Cir.).

They need not know the entire scope of conspiracy or identity of its members.

U. S. v. Wilson, 23 Fed. (2d) 112. *Certiorari* denied.

To withdraw from a conspiracy requires some affirmative action on the part of the one desiring to sever connections therewith.

Hyde v. U. S., 225 U. S. 347, 56 L. Ed. 1114;
Miller v. U. S., 277 Fed. 721.

None of the accused did this. Mere discontinuance of financial contributions to it is not a withdrawal.

The identity of the conspiracy is not destroyed by the subsequent connection of new parties therewith.

U. S. v. Nunnemacher, Fed. Cas. No. 15902;

Hagen v. U. S., 268 Fed. 344 (9th Cir.) *Cert.* denied;

Norton v. U. S., 295 Fed. 136.

On page 6 of his brief, however, appellant states that according to the testimony of Stumpf, he had engaged in two other distinct conspiracies or combinations; combination number one being to defraud Brix of money, and combination number two being to defraud Coates of money. But assuming, for the sake of argument but not otherwise, that during the course of the conspiracy and in carrying it to fruition, some of its devious ramifications may have taken the form of minor conspiracies among themselves to fraudulently obtain more money from some of their own number, than was intended to be invested in the scheme, this has no importance whatever in determining the guilt or innocence of the conspirators under the charge in the indictment. Such evidence may reflect upon and tend to establish the existence of the particular conspiracy charged, but that is the limit of its applicability, as the question here presented is whether the appellant was a party to the particular conspiracy charged.

Jezewski v. United States, supra.

It is conceded in this connection by appellant that the "evidence of these distinct transactions went in practically without opposition" and that "exceptions were not saved",

but it is contended that notwithstanding this the court has power and should consider the alleged error and "relieve the applicant therefrom".

This alleged error has not been urged before. It was not assigned as error until appellant's brief was filed, wherein it appears as assignment number X. This is not in accordance with rule 11 of this court, which provides that an assignment of errors shall be filed with a petition of appeal and that "error not assigned according to this rule will be disregarded, but the court at its option, may notice a plain error not assigned."

The court need not consider objections not contained in the assignment of errors but set out for the first time in the briefs.

Wong Tai v. U. S., 273 U. S. 77.

In view of the evidence, it is hard to see wherein appellant was prejudiced, assuming without admitting that there was error. The strictness of the common law rules has yielded in modern practice to the doctrine that formal errors, not prejudicial to the rights of the accused, will be disregarded.

Section 269 of the Judicial Code (Tit. 28, Sec. 391, U. S. C. A., R. S. 726) provides:

> "On the hearing of an appeal, *certiorari,* writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties."

This court, in the case of *Green v. United States,* 19 Fed. (2) 850, said:

> "But, while the ruling of the court below may have been technically error, we think it was error which did not effect the substantial rights of any defendant. Under Section 269 of the Judicial Code (Comp. St. 1919, Sec. 1246), a conviction is not reversible for errors on the trial where the defendant's guilt is clear."

In support of the quotation last above, this court cited eight decisions of Circuit Courts of Appeal and one of the Supreme Court of the United States, *Horning v. District of Columbia,* 254 U. S. 135, 65 L. Ed. 185. The Supreme Court said, in said referred to case:

> "If the defendant suffered any wrong, it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt."

In support of his position on this point, appellant cites and quotes from the case of *Lamento v. United States,* 4 Fed. (2) 901. In the cited case, the court was dealing with an indictment charging the plaintiff in error with violation of the narcotic laws, alleging that the accused, being a retail dealer, was in possession of about six ounces of opium without having paid the special tax and that he purchased such narcotics, the same not being in nor from the original stamped package. The court instructed the jury that if they concluded that this small quantity of opium was found in the defendant's possession or control, that fact carried with it the conclusive presumption that the defendant was a retailer and required the jury to find him guilty. Such an instruction compelled the jury to find

the accused guilty as a retailer of narcotics from the mere possession of a small quantity thereof, even though he may have had it for his own use.

The case at bar, however, is very different, for the evidence is absolutely conclusive and convincing as to the guilty participation of this appellant in the conspiracy charged in the indictment.

In support of appellant's contention on this point, he also cites the case of *Terry v. United States,* 7 Fed. (2) 28, decided by this court in 1925.

In the last cited case, the indictment charges that the sixteen defendants therein, at Allen's Wharf in Monterey county, conspired together to commit offenses in violation of the Prohibition Act to the number of ten, and sets forth a large number of overt acts. Testimony was received over objection tending to prove that some six weeks prior to the incident at Allen's Wharf, the plaintiff in error employed one Frohn not a defendant to transport several barrels of liquor from Bodega Bay to a ranch house in the vicinity of Petaluma; that at about the same time, one of the defendants, Zucker, rented a barn from one Sousa in the vicinity of Petaluma and nine barrels of liquor were stored therein. This court, in its opinion, stated:

> "There was no evidence of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident or transaction"

that is, the incident at Allen's Wharf. This court, in passing upon the question, stated:

> "Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the incident at Bodega

> Bay. On the other hand, every inference from the testimony is to the contrary. There is no testimony tending to show that the parties assembled at Allen's Wharf were parties to a conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay six weeks before or that they had any knowledge whatever of that transaction. * * * The indictment charges no conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay in terms and avers no overt act to effect the object of such a conspiracy, if one existed."

In the instant case, all the transactions shown by the evidence related to one purpose only.

A substantive offense and a conspiracy to commit a substantive offense are separate and distinct offenses.

Marcus v. U. S., 26 Fed. (2d) 454;
Perry v. U. S., 18 Fed. (2d) 477.

An indictment for conspiracy need not allege all the elements necessary to charge the substantive offense which is the object of the conspiracy.

Wong Tai v. U. S., 273 U. S. 77, *supra;*
Hartson v. U. S., 14 Fed. (2d) 561.

And it need not describe the offense which is the purpose of the conspiracy with particularity.

U. S. v. Eisenminger, 16 Fed. (2d) 816;
Ford v. U. S., 10 Fed. (2d) 339 (9th Cir.), (affirmed, 273 U. S. 593);
Perry v. U. S., 39 Fed. (2d) 52.

As was said in the case of *Cochran v. United States,* 157 U. S. 286; 39 Law Ed. 704:

> "The true test is not whether the indictment might possibly have been made more certain, but whether it

> contains every element of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."
>
> "The object of criminal proceedings is to convict the guilty as well as to shield the innocent."
>
> *Evans v. U. S.,* 155 U. S. 504, 38 Law Ed. 830.

The next case cited is *United States v. Robinson,* 266 Fed. 243. This case holds that the overt acts charged cannot be resorted to to explain or aid in making out the criminal charge of conspiracy. The principle there announced is well supported by eminent authority, but we fail to see wherein it has any application to the facts in this case.

The case of *Brenner v. United States,* 287 Fed. 636 (2nd Circuit), is an indictment for conspiracy to use non-beverage alcohol for beverage purposes in violation of the Food Control Act, which charges as an overt act the purchase of five barrels of distilled spirits. The statute referred to contains nothing which made it unlawful to receive and transport alcohol or to have it in their possession or in their place of business. There is no charge that the accused conspired to sell such liquor for beverage purposes or for any other purpose. The Act referred to was known as the Lever Act which placed in the hands of the Government for war purposes absolute control over the distribution of food and fuel, but contained nothing prohibiting the use of non-beverage alcohol for beverage purposes. The indictment does not state

what contemplated use would constitute an offense, and because of such failure to state what the offense was, the indictment was held defective.

We will not undertake to review or analyze the many other cases cited by appellant in support of his contention that count one of the indictment is insufficient.

The charge of conspiracy need not be stated in the indictment with the same degree of particularity as is required in charging the substantive offense. The outlines of the confederation may be general in their character in the minds of the plotters. The precise means of effecting the scheme may not have been predetermined but left to the exigencies of the enterprise as it progressed.

Lew Moy v. U. S., 237 Fed. 50 (8th Cir.);
Dealy v. U. S., 152 U. S. 539, 38 L. Ed. 545.

Count one of the instant case alleges the conspiracy in the usual form, after which follows a more specific allegation:

> "That is to say that they, the defendants, would thereupon unlawfully, and in violation of Sections 3 and 25, Title II of said Act, manufacture and possess apparatus intended and designed . . . for the manufacture of intoxicating liquor, all of which should then and there be fit for beverage purposes and all of which contained more than one-half of one per cent of alcohol by volume, none of said defendants then and there having or intending to have a permit" from any proper officer of the United States.

Under the laws of the United States no one is permitted to manufacture intoxicating liquor without a permit.

It is inconceivable on what theory it should be required that the indictment specify the particular articles contem-

plated for use in this business. As a matter of fact, in order to constitute a conspiracy of this character, it is not required to prove that any apparatus whatever was actually manufactured.

The success or failure of the object of the conspiracy is immaterial if, in the furtherance thereof, one of the overt acts charged was committed by any one of the conspirators.

Lewis v. U. S., 11 Fed. (2d) 745 (6th Cir.);
Hyde v. U. S., 225 U. S. 347, 56 L. Ed. 1114.

Count I of the Indictment.

On page 34 of his brief, appellant argues that where the language of the statute is general in terms and does not specifically set out the elements constituting the offense, an indictment charging the offense in the generic terms of the statute is not sufficient.

In this counsel for appellant, we believe, are assuming something that is not a fact. The indictment charges conspiracy under section 37 of the Criminal Code (Title 18, Sec. 88, U. S. C. A.), which provides that "if two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose * * *" they are guilty. The indictment goes far beyond the generic terms of the statute and points out the particular laws that were violated and the manner and means to be followed in their violation.

In support of this contention, appellant cites several cases among which is *Pettibone v. United States*, 37 Law

Ed. 419; 148 U. S. 197. That indictment was against persons for corruptly and by threats and force intimidating and impeding a witness and officer in a court of the United States in the discharge of his duty but did not charge knowledge or notice or set out facts showing knowledge or notice on the part of the accused that the witness or officer was such. It is therefore evident that the Pettibone case has no application here.

The cited case was decided in 1893, long before the passage of R. S. 1025 (Title 18, Sec. 556, U. S. C. A.), which provides:

> "No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant."

The *Cochran case, supra,* very recently has been cited with approval by the Supreme Court of the United States in the case of

Hagner v. U. S., decided April 11, 1932.

The Hagner case also cites the following:

Rosen v. U. S., 161 U. S. 29, 34;
Grandi v. U. S., 262 Fed. 123;
Stephens v. U. S., 261 Fed. 590;
Bouldin v. U. S., 261 Fed. 672;
Phipps v. U. S., 251 Fed. 879.

We quote the following from the Hagner case:

> "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

The Rule Requiring Certainty in the Indictment.

On page 40 of his brief appellant cites the case of *United States v. Cruikshank,* 92 U. S. 542, 23 Law Edition, 588. The cited case was decided in 1875, long before the enactment of section 269 of the Judicial Code (Tit. 28, Sec. 391, U. S. C. A. passed February 26, 1919, 40 Stat. 1181). But notwithstanding that fact we believe that the indictment in the instant case complies with every requirement laid down by the Supreme Court in the Cruikshank case.

We respectfully submit that "every ingredient of which the offense is composed" is "accurately and clearly alleged" and that the description of the charge of conspiracy is sufficient to advise the accused of the charge against him and that the allegations are sufficient to enable him protection against further prosecution for the same cause and are sufficient to support a conviction.

It Was Not Error to Admit Statement of Olie Olson.

On page 41 of his brief appellant states that his rights were invaded by the admission in evidence of the signed statement of the defendant Olie Olson which was made after the conspiracy terminated claiming that the evidence was hearsay.

This point has already been discussed under the heading of "Testimony of Whitfield" where we have shown that the court admitted this statement as against Olson only and specifically instructed the jury that it could not be considered for any other purpose.

The logical effect of appellant's objection to the admission of this statement carried to its ultimate end would bar

any confession or statement made by any one defendant where there are several accused in the same indictment from being received in evidence for any purposes whatever. Such ruling would require that each defendant be tried separately where there is any statement or confession involved.

In the course of appellant's discussion on this point he cites the case of *People v. Gonzales,* 136 Cal. 666. In that case two defendants were jointly charged with murder and the court admitted declarations made by one of the defendants inculpating the other and tending to excuse his own conduct. The Olson statement is altogether different as he does not attempt to excuse himself or to inculpate others except so far as the bare statement of the facts involved them.

The cited case, however, was decided in 1902 before the adoption of section 4½, Art. VI of the Cal. Constitutions, which reads as follows:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Government's Exhibit 6, Consisting of Liquid Taken From the Gravity Tanks at the Foss Ranch.

On page 42 appellant asserts that it was error to admit the above referred to exhibit and that the rights of appellant were prejudiced thereby. This subject has already

been discussed on previous pages of this brief under the heading of "Facts". The evidence shows that the still in question was set up and operated and the mash which Whitfield obtained from the gravity tanks shows the purpose for which the still was constructed.

The mash was analyzed and found to contain 3.24 per cent. alcohol by volume. The mere fact that this mash was not analyzed until some time after the termination of the conspiracy and that the alcoholic content might have resulted from fermentation subsequent to the abandonment of the still, the presence of such alcohol is *prima facie* evidence tending to show the purpose for which the apparatus, still, etc., were intended. The fact that some time elapsed between the time the mash was deposited in the gravity tanks and the time it was analyzed goes solely to the weight of the evidence.

On page 46 of his brief appellant contends that prejudicial error was committed by the court in refusing the defendant Coates the right to develop through the cross-examination of Malter the motives which impelled him to come forward and testify and the refusal of the court to permit appellant to develop bias, prejudice and interest on the part of Malter. As we have already stated on previous pages of this brief appellant was accorded every reasonable opportunity to show the interest or bias if any of Malter. The record shows that Malter was one of the originators of the conspiracy; that he was not indicted; that he assisted the government in obtaining the still involved and in offering his testimony in its behalf. Furthermore, we fail to understand wherein an answer to the question shown on page 45 would have helped appellant. The testi-

mony of Malter obviously had very little impression upon the jury and the transcript of his testimony will show that he afforded very little corroboration to the testimony of Stumpf. This is manifest for the reason that while Malter and Stumpf both testified that the defendant Brix was an active fellow-conspirator in the early stages of the enterprise, the jury failed to convict Brix. It is therefore impossible to conceive wherein and in what manner Coates was prejudiced by the ruling of the court complained of.

The comments of appellant on pages 45-46 of his brief concerning the exclusion of the testimony of the witness Malter on the ground that he had been permitted to read from the reporter's daily transcript has already been discussed.

From a full and careful review of the record and after careful consideration of the points urged by appellant we fail to discover any error on the part of the trial court which did or could have operated to the injury or prejudice of this appellant and we therefore respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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P. V. DAVIS,
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